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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DOCK McNEELY,

Defendant and Appellant.

C063051

(Super. Ct. No.
07F09282)

Defendant Dock McNeely appeals the sentence imposed following his convictions for failing to register as a sex offender within five days of coming into a county and failing to register as a sex offender annually within five days of his birthday. On appeal, he contends counsel was ineffective in failing to make a *Romero* (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-531 (*Romero*)) motion seeking dismissal of his prior strike conviction. Defendant also contends the abstract of judgment must be corrected to show the proper amount of credit for time served. We agree the abstract should be corrected, but do not agree that defendant was not

afforded effective assistance of counsel. We will order the abstract of judgment be corrected and otherwise affirm the judgment.

FACTS AND PROCEEDINGS

On March 25, 1994, defendant pleaded guilty to one count of continuous sexual abuse of a child. As a result, on August 25, 1995, he was placed on five years' probation. Also as a result of the conviction, he was required to register as a sex offender.

Approximately every 30 days from September 15, 2006 through September 13, 2007, defendant registered as a sex offender at the Sacramento Sexual Assault Felony Enforcement (SAFE) Team office, stating he was a transient. During this time, defendant had a girlfriend, Lisa Brown, who lived in Elk Grove. Defendant told the neighbors he lived there and was not leaving. He spent multiple nights each week at her house, parked his car in her garage and stored his personal property there. In November of 2006, he rented a mailbox at a UPS store about a mile and a half from Brown's home. He used this mailbox address to apply for and receive an electronic benefits transfer (EBT) card for cash aid and food stamps. Throughout the year, the EBT card was used at various stores within a five-mile radius of Brown's home in Elk Grove. Defendant did household chores at the home, interacted with the neighbors, fished from the dock and used a paddleboat in the lake near the home. A sex offender living in

Elk Grove is required to register with the Elk Grove Police Department.

In June 2007, the SAFE team officers became suspicious of defendant's claimed status as a transient. He appeared too well dressed and well groomed. As part of the registration process, they asked him standard questions about his transient status. Defendant was uncooperative, and his demeanor was evasive and argumentative. Accordingly, they began an investigation. They established surveillance of him after he came in to register in June, July, August, and September. Their surveillance revealed defendant might be living in Elk Grove at Brown's house.

In late September 2007, a search warrant was served at Brown's house. Defendant was in the house alone, wearing a bathrobe. His personal property was found in the house and garage and his car was parked in the garage. Between September 2006 and September 2007, defendant did not register as a sex offender with the Elk Grove Police Department. He was arrested for failing to register as a sex offender.

Defendant denied that he lived at Brown's home. He stated he never stayed there more than a couple of nights a week. Brown had made it clear to him that he could not register as living at her home unless he married her. He admitted spending time in the home as Brown's guest and boyfriend, showering there, eating there and storing important records and clothes there. He also admitted caring for her yard and shopping at nearby stores. He did not have a key to the home, did not

receive mail there and did not pay bills there. Brown's testimony was consistent with defendant's testimony.

Following his arrest in September, on March 4, 2008, defendant was released from custody. Shortly thereafter, he rented an apartment on Hudson Way. On March 10, 2008, he registered as a sex offender with the appropriate office. The registration form showed his birth date as June 11, 1953.

In late June, it was discovered defendant had failed to file an annual registration form within five days of his birthday. On June 25, 2008, officers went to the apartment on Hudson Way and arrested him.

Defendant claimed he failed to register within five days of his birthday because he was having a mental breakdown and was bedridden. He admitted he had been released from custody on bail at the time he was arrested in June.

Defendant was charged with failure to register as a sex offender within five days of coming into a city or county (Pen. Code, § 290, subd. (g)(2), count 1; undesignated statutory references that follow are to the Penal Code) and failure to register as a sex offender annually within five days of his birthday. (§ 290.018, subd. (b), count 2.) It was further alleged that the failure to register as alleged in count 2 was committed while defendant was released from custody on bail (§ 12022.1, subd. (b)) and that defendant had a prior serious felony conviction. (§§ 667, subds. (b)-(i), 1170.12.)

Following a jury trial, defendant was found guilty as charged and the sentence enhancement allegations were found

true. Defendant's request for probation was denied. He was sentenced to an aggregate term of seven years four months in prison. He was granted 655 days' credit for time served consisting of 382 days actual credit, 190 good time credits under section 4019 and 83 days' credit for time served at Napa State Hospital.

DISCUSSION

I

Effective Assistance of Counsel

Defendant contends he was denied effective assistance of counsel when his counsel failed to make a *Romero* motion to dismiss the prior strike conviction. He argues that this failure fell below the standard expectation of a reasonably competent attorney because his "prior conviction was fairly old and he had been granted and completed probation on that conviction, and his present convictions were simply failure to register offenses" We disagree with this contention.

A sentencing court has the discretion to strike a prior strike conviction in the furtherance of justice (§ 1385; *Romero*, *supra*, 13 Cal.4th at pp. 529-531). Failure to make a *Romero* motion forfeits the issue on appeal. (*People v. Carmony* (2004) 33 Cal.4th 367, 375-376 (*Carmony*).) Accordingly, defendant does not contend that the trial court abused its discretion by not striking his prior conviction. Rather, he claims his sentence is the product of ineffective assistance of counsel because his trial counsel did not request the court strike his prior strike conviction.

In order to demonstrate ineffective assistance of counsel, defendant must show counsel's action was, objectively considered, both deficient under prevailing professional norms and prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693].) To establish prejudice, the defendant must show a reasonable probability, sufficient to undermine confidence in the outcome, that, but for the allegedly deficient performance, the result of the proceeding would have been different. (*Strickland v. Washington, supra*, 466 U.S. at pp. 693-694 [80 L.Ed.2d at pp. 697-698]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) The defendant "must carry his burden of proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel." (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

The trial court's discretion to strike a prior strike pursuant to section 1385 is limited. The Three Strikes law "was intended to restrict courts' discretion in sentencing repeat offenders." (*Romero, supra*, 13 Cal.4th at p. 528.) It establishes "'a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike'" unless the sentencing court finds a reason for making an exception to this rule. (*Carmony, supra*, 33 Cal.4th at p. 377.)

There are "stringent standards that sentencing courts must follow in order to find such an exception." (*Carmony, supra*, 33 Cal.4th at p. 377.) In order to strike a prior strike "the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious

and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies."

(*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Since the trial court has discretion to strike a prior strike on its own motion (*People v. Sotomayor* (1996) 47 Cal.App.4th 382, 390-391), defendant's claim of ineffective assistance of counsel requires us to infer that the lower court was unaware of its discretion to strike his prior strike. That is an inference we cannot accept.

If the record affirmatively established that the court was aware of its authority to strike the prior, then clearly defendant could not establish that his attorney's failure to bring a motion to strike resulted in any prejudice. This record is silent regarding the court's awareness of its authority to strike the prior. Even so, on a silent record, the "trial court is presumed to have been aware of and followed the applicable law" when exercising its discretion. (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496; accord, Evid. Code, § 664.) The appellate court cannot presume error where the record does not establish on its face that the trial court misunderstood the scope of its sentencing discretion. (*People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1521-1523; *People v. Davis* (1996) 50 Cal.App.4th 168, 170-173.)

But even if we were willing to infer that the trial court was unaware of its discretion to disregard defendant's strike for purposes of sentencing in this matter and counsel's representation was deficient under prevailing professional norms when counsel failed to request the court to consider its discretion under *Romero*, defendant still could not prevail because he cannot show prejudice arising from counsel's deficiency.

"[T]he three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*Carmony, supra*, 33 Cal.4th at p. 378.) Defendant is not prejudiced by counsel's failure to make a *Romero* motion unless there were sufficiently compelling reasons to support overcoming the strong presumption in favor of applying the Three Strikes law. We find he cannot.

Despite defendant's claim, his record and current offenses are not so de minimus that there is a reasonable probability the court would have dismissed the prior strike. Defendant's claim in this regard largely relies on his characterization of his current offenses as "no worse than a breach of an overtime parking ordinance." We reject this characterization, as did the court below.

"The purpose of the sex offender registration law is to require that the offender identify his present address to law

enforcement authorities so that he or she is readily available for police surveillance." (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1072 (*Carmony II*).) Here, defendant's failure to register at his girlfriend's Elk Grove address thwarted this fundamental purpose. For over a year, defendant registered as a transient in Sacramento while living in Elk Grove. When SAFE officers became suspicious of his transient status, he did not answer questions directly but was evasive and uncooperative. His actions evinced a "blatant disregard of the registration act and complete undercutting of the act's purposes." This is a serious offense. (*People v. Nichols* (2009) 176 Cal.App.4th 428, 437.) While his second offense was a failure to register annually, rather than after a change of address, the seriousness of that offense is compounded in that it was committed while he was on bail for his previous failure to register and had demonstrated a willingness and ability to evade the requirements of the registration law.

Defendant claims as to his prospects, "he appeared to be doing well out of custody. [Defendant] was driving a fairly nice Jeep, had an intelligent girlfriend, and was well groom[ed]." We do not find those to be the sort of circumstances which remove defendant from the Three Strikes law. Defendant has a high school education. He receives \$900 in Social Security Disability. Prior to his 1995 conviction, he worked in a number of fields, but there is no indication in the record that he is currently employed or has any prospects for being employed.

It is true that defendant's prior conviction occurred 13 years previously and he suffered no convictions in the interim. That offense is not so remote in time, however, that its remoteness, in and of itself, makes defendant's circumstances sufficiently compelling to remove him from the spirit of the Three Strikes law. Defendant was on probation for that offense until 2000 and began falsely registering as a transient only six years later, in 2006.

Defendant also seeks to minimize the gravity of the registration offense noting he was released from custody on bail and granted probation. However, defendant was convicted of a serious felony, continuous sexual abuse of a child. The probation report indicates defendant had been molesting his then girlfriend's daughter several times a week for approximately two years. The victim was 15 years old when the abuse was reported. Defendant was approximately 40 years old at the time. The victim reported defendant touched her genitals over her clothing, pressed his penis against her mouth and face, and when she was sleeping, the abuse included penetration and masturbation. The victim and her mother waited to report the abuse until defendant moved out of the home, because they were afraid for their family's safety. This was a serious offense of precisely the type the Three Strikes law is aimed at.

Further weighing against a claim of prejudice are the court's statements in the record, which indicate even had the motion been made, the court would have denied it. The court noted defendant was not statutorily eligible for probation, but

even if he had been, "it would not have been appropriate in this instance as the manner in which the crime was carried out demonstrated sophistication on the part of the defendant." This suggests the court agreed with the prosecution that defendant's offenses revealed "a sophisticated set of behaviors on [defendant's] behalf to avoid compliance with the sex offender registration law and to avoid being monitored or located by law enforcement for a very significant period of time."

In addition, the court recognized its discretion under section 1385 to strike the on-bail enhancement in furtherance of justice and declined to exercise that discretion. In support of the motion to strike the on-bail enhancement, defense counsel argued that as to the second violation, the failure to register annually, defendant had registered at the Hudson Way address and thus, "there was really no issue in terms of the purpose of the law that [defendant] had violated. In terms of the any -- effort to try to conceal his whereabouts, the officers went directly to the Hudson address and he was sitting right there in the front room on the telephone. And so I would submit to the Court that under those circumstances that this was a technical violation." Had the court accepted this argument and stricken the on-bail enhancement, defendant's sentence would have been reduced by two years, from an aggregate term of seven years four months to a term of five years four months. The court rejected this argument and found defendant did not "fall within the kind of criteria that are appropriately applied to strike an enhancement of this character." The rejection of the motion to

strike the on-bail enhancement, and reduce defendant's sentence by two years, strongly suggests the court would have also rejected a claim under section 1385 to strike defendant's prior conviction and thereby reduce his sentence by two years eight months.

The court rejected defendant's claim that the offenses were "simply failure to register offenses, and were not even serious violations of that offense." This record did not present the sort of compelling circumstances which would have been necessary for the trial court to justify a decision to strike defendant's prior conviction. Moreover, the court declined to exercise its discretion to strike defendant's on-bail enhancement based on largely the same argument defendant makes here. Based on this record, we find there was no prejudice in counsel's failure to make a *Romero* motion, as we find no reasonable probability the court would have granted it. Accordingly, defendant's claim of ineffective assistance of counsel fails.

II

The Abstract of Judgment

Defendant next contends the abstract of judgment must be corrected to reflect the correct total of custody credits awarded. The People correctly note that the abstract of judgment does reflect the award of 83 days' credit for time served at Napa State Hospital. It does not, however, include those credits in the "Total Credits." We agree with defendant that the abstract should reflect the correct total number of days of credit granted.

III

Additional Conduct Credits

The recent amendments to section 4019 do not operate to modify defendant's entitlement to credit, as he was convicted of a prior serious felony and required to register as a sex offender. (§ 4019, subds. (b)(2), (c)(2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

DISPOSITION

The judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect the total number of credits granted at 655 and forward a copy of the amended abstract to the Department of Corrections and Rehabilitation.

HULL, Acting P. J.

We concur:

ROBIE, J.

BUTZ, J.